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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re Z.T. et al., Persons Coming
Under the Juvenile Court Law.

B286814
(Los Angeles County
Super. Ct. No. CK71246)

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN
AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

S.T.,

Defendant and Appellant.

APPEAL from an order of the Superior Court of Los Angeles County, Philip L. Soto, Judge. Affirmed.

Roni Keller, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, R. Keith Davis, Assistant County Counsel, David Michael Miller, Deputy County Counsel, for Plaintiff and Respondent.

Mother appeals from the disposition order of the juvenile court. She contends that the court had no grounds to release Z.T. and Z.C.T. to their father and the order violated the Indian Child Welfare Act (25 U.S.C. § 1901 et seq. (ICWA)). We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

I. The previous dependencies

Z.T. and her older half-brother Z.J.¹ were declared dependents of the juvenile court in 2008 because of mother's physical abuse of Z.J., her substance abuse, and domestic violence. (Welf. & Inst. Code, § 300, subds. (a) & (b)(1).)² The following year, the juvenile court sustained a subsequent petition (§ 342) alleging mother's continued physical abuse of Z.J. and positive drug-test results, despite participation in court-ordered services. In 2010, the juvenile court terminated its jurisdiction and gave Z.J.'s father sole physical custody of the child.

In June 2012, the juvenile court sustained a petition on behalf of Z.C.T. alleging that mother had limited ability to cope with the child's severe behavioral and emotional problems. Mother yelled at Z.C.T., called her demeaning names, used profanity, and threatened to abandon the child at the doctor's office. A subsequent petition alleged that mother had a history of mental and emotional problems, including paranoid schizophrenia and homicidal ideation, which rendered her incapable of caring for Z.C.T. The court terminated its jurisdiction over Z.T. and Z.C.T. with a custody order granting

¹ Neither Z.J. nor his father is a party to this appeal.

² All further statutory references are to the Welfare and Institutions Code.

sole physical custody of them to father, and monitored visits to mother.

II. The current dependency

Father has an extensive criminal history but has been out of jail for 20 years. The Department of Children and Family Services (the Department) recognized that both parents had mental health challenges. Mother's clinical diagnosis is untreated. Father has a significant level of agitation irritability, anger outbursts, and paranoia but no history of intervention.

The Department received four referrals between late 2016 and mid-2017 alleging neglect and physical abuse of the children by father; sexual abuse of Z.T. by a classmate; and that father smelled of alcohol when he brought the girls to a mental health assessment and was dismissive of the risk involved. Father declared in front of Z.C.T. that he did not want her in his home.

Father volunteered to the social worker that he disciplined Z.C.T. by scratching her and spanking her with an open hand, a belt, and hand-held vacuum cleaner, because "the bitch doesn't listen." He also admitted using profanity when speaking to the children. Believing that Z.C.T. is oppositional and defiant, father was verbally aggressive towards her, and threatened to abandon her.

Z.C.T. showed the social worker the scratches and bruises on her face and legs caused by father. Still, neither she nor Z.T. was afraid of father; both girls enjoyed living with him.

The Department filed a section 300 petition. It detained the children and placed them in foster care.

The Department's jurisdiction and disposition report reflected the findings of a multi-disciplinary assessment team.

Both girls were in special education, had severe mental health problems, and were receiving mental health services.

Z.C.T. reiterated that she wanted to return to father's care. She reported that father had ceased using physical punishment. She maintained she was not afraid of him. Father declared he would never hit his children again.

Mother tested positive for cannabinoids and inquired why she should stop smoking it if she does not have custody of her children. She wrote to the juvenile court that she was "totally against [father] having custody of the girls."

The Department recommended that the juvenile court release the children to father and order family maintenance services, provided that father showed significant progress in addressing case issues, the girls' mental health was assessed, and they received services. The Department reasoned that the children wanted to reside with father, with whom they felt safe. Father had sought assistance for support services and had been in the process of seeking counseling for the children before the Department's involvement.

Both parents pled no contest to the allegations in the petition. It alleged that father inappropriately and excessively physically disciplined Z.C.T. Mother allegedly failed to participate in her prior court-ordered case plan, and has an unresolved history of substance abuse, which renders her incapable of providing the children with regular care and which caused two of her children to be dependents of the juvenile court previously. The court sustained the allegations under section 300, subdivisions (b) and (j).

As for disposition, mother reiterated she was "not in agreement with the court making a home of parent father order

at this time.” Instead, mother asked the court to make “a suitable placement order and provide the Department with discretion to release to either parent based on progress in the programs.”

The juvenile court signaled its intention to adopt the Department’s recommendation to place the children with father, over mother’s strenuous objection. The court reasoned that father and the Department had negotiated an early resolution under which the children would be released to father in return for his plea and agreement to participate in court-ordered services. Father had already complied with orders that he enroll Z.T. with the regional center and he had commenced counseling. The Department agreed to submit a report to counsel within a week confirming father’s enrollment in the programs that were the condition for releasing the girls to him. Father acknowledged in open court that his failure to continue in his court-ordered programs would be grounds for removing the children from his custody. Accordingly, the court found that the Department had made reasonable efforts to keep the children safe and to avoid removing them, and ordered that the girls be placed in father’s custody. The court noted that mother did not have custody of the girls at the time the petition was filed and found clear and convincing evidence that detriment existed if the children were placed in mother’s care. (§ 361, subd. (c).) The court ordered enhancement services for mother. Mother’s appeal followed.

Thereafter, we granted the Department’s request to take judicial notice of the juvenile court’s minute orders of February 6, 2018 and of the juvenile custody order filed on February 9, 2018. These documents show that the court terminated its jurisdiction over Z.T. and Z.C.T. and issued a custody order awarding father

sole legal and physical custody and mother unmonitored visitation.

DISCUSSION

I. No abuse of discretion in placing the children with father

Mother does not challenge the decision under section 361, subdivision (c) not to place the girls with her. Rather, she contests the court's order placing the girls with father.

Once the juvenile court has assumed jurisdiction over a child, it must hold a disposition hearing to determine an appropriate placement for the child. (*In re Maya L.* (2014) 232 Cal.App.4th 81, 97.) "In making its disposition orders the court has broad discretion to resolve issues regarding the custody and control of the child, including deciding where the child will live while under the court's supervision." (*In re Anthony Q.* (2016) 5 Cal.App.5th 336, 346.)

That discretion is not unfettered. The court "may impose only those limits on parental rights that are necessary to protect the child. [Citations.] . . . [citation], 'Even after a dependency finding has been made, the statutory scheme is designed to allow retention of parental rights to the greatest degree consistent with the child's safety and welfare, and to return full custody and control to the parents or guardians if, and as soon as, the circumstances warrant.'" (*In re Anthony Q.*, *supra*, 5 Cal.App.5th at pp. 346–347.) Thus, to remove a dependent child from the physical custody of his or her parents with whom the child resided at the time the petition was filed, the court must find clear and convincing evidence of substantial danger to the child's physical health, safety, protection, or physical or emotional well-being if the child were returned home, and there

are no reasonable means by which the child's health can be protected without removal. (§ 361, subd. (c).) In short, "the law requires that a child remain in parental custody pending the resolution of dependency proceedings, despite the problems that led the court to take jurisdiction over the child, unless the court is clearly convinced that such a disposition would harm the child." (*In re Henry V.* (2004) 119 Cal.App.4th 522, 525.)

Here, the record shows that Z.T. and Z.C.T. are not in danger in father's custody. Father immediately admitted hitting Z.C.T. and ceased that practice when the Department intervened. He explained that it was not his ordinary form of discipline. Normally, he sent the child to the corner or to the bathroom as punishment, and he never hit Z.T. Father expressed remorse and was amenable to services to learn new parenting practices. The children are not afraid of father and want to live with him. Moreover, father had voluntarily enrolled the girls in counseling before the Department became involved. He was involved in the children's schooling. The Department was not concerned for the girls' safety in father's care because it recommended that disposition provided father participated in services.

Mother argues that the children should have been placed with her or in foster care until it could place the girls with one or the other parent. But, the court made the necessary finding under section 361, subdivision (c) to deny mother custody. And, an "out-of-home placement is not a proper means of hedging against the possibility of failed reunification efforts, or of securing parental cooperation with those efforts. It is a last resort, to be considered only when the child would be in danger if allowed to reside with the parent." (*In re Henry V.*, *supra*, 119 Cal.App.4th at p. 525.)

We may only reverse a dispositional order upon a finding of clear abuse of discretion. (*In re N.M.* (2011) 197 Cal.App.4th 159, 171.) We will only disturb a court's exercise of discretion if we find that that no judge could reasonably have made the decision, given all of the evidence, viewed most favorably in support of the juvenile court's action. (*In re Robert L.* (1993) 21 Cal.App.4th 1057, 1067.) Given the circumstances before the juvenile court where these children were not in danger in father's care, the court made a reasonable decision.

II. ICWA does not apply³

Mother contends that the juvenile court violated ICWA when it declared that this case is not subject to that act.

At the jurisdictional hearing, the juvenile court found that ICWA did not apply to father. He is not Native American. The Department indicated that the court had previously found ICWA inapplicable, but mother recently indicated that her deceased grandmother had "information" about Native American heritage. Mother had heard that she has Blackfoot and Cherokee ancestry but claimed that no one in her family had additional information. The court declared that this was not an ICWA case, but nonetheless ordered the Department to investigate mother's claim of Native American heritage and to send notice to any applicable tribes and the Bureau of Indian Affairs.

³ A federal district court in Texas has held ICWA unconstitutional because, among other reasons, the statute violates improperly requires state agencies to apply federal standards to state claims. (*Brackeen v. Zinke* (N.D.Tex. 2018) 338 F.Supp.3d 514, 539.) However, we are not bound by a lower federal court opinion. (*Castaneda v. Department of Corrections & Rehabilitation* (2013) 212 Cal.App.4th 1051, 1074.)

ICWA imposes on courts and county welfare departments the “affirmative and continuing duty to inquire whether a child for whom a petition under Section 300 . . . is to be, or has been, filed, is or may be an Indian child.” (Former § 224.3, subd. (a).)⁴ Notice to tribes must be sent in numerous types of proceedings (former §§ 224.2, subd. (a), 224.1, subd. (d)), but not a proceeding which the child is placed with a parent (*In re J.B.* (2009) 178 Cal.App.4th 751, 757–758).

The juvenile court here placed the children with their own father, who did not have Indian heritage, rather than in foster care. Therefore, the court correctly concluded that this was not an ICWA proceeding.

DISPOSITION

The order is affirmed.

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DHANIDINA, J.

We concur:

EDMON, P. J.

LAVIN, J.

⁴ The Legislature repealed and recast numerous provisions of the California ICWA including as is relevant here, sections 224.1, 224.2, and 224.3. (Stats. 2018, ch. 833, §§ 3, 5 & 7, eff. Jan. 1, 2019.) Those amendments were effective after this appeal was filed and so they are not pertinent.